

Pete Flaherty
LC/5

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of Twin Bridge Ski Club,)	
Wisconsin Public Service Corporation,)	
Boy Scouts of America and Town of)	
Stephenson for a Permit to Construct)	Case No. 3-LM-91-511
a Pier and Performance Platform on the)	
Bed of High Falls Flowage, Town of)	
Stephenson, Marinette County, Wisconsin)	

FINDING OF FACT, CONCLUSIONS OF LAW AND ORDER

The Twin Bridge Ski Club, et al, filed an application pursuant to § 30.12, Stats., to construct a pier and performance platform on the bed of High Falls Flowage in the Town of Stephenson, Marinette County, Wisconsin. The Department of Natural Resources issued a notice which stated that unless written objection was made within thirty days after publication, the Department might issue a decision on the permit without a hearing. Several objections were received by the Department.

Pursuant to due notice a hearing was held on June 13, 1995 in Marinette, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presided. The applicant filed its post hearing brief on June 29, 1995 and the Department filed a response brief on July 3, 1995. The applicant was given an opportunity to file a reply brief. No reply brief was received and the record was closed on August 7, 1995.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Twin Bridge Ski Club, by

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Boy Scouts of America and Town of Stephenson, by

Robert O. Kamps
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Wisconsin Public Service Corporation, by

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Department of Natural Resources, by

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FINDINGS OF FACT

1. High Falls Flowage is part of a navigable waterway created by damming along the Peshtigo River in Marinette County. The surface of the High Falls Flowage is approximately 1700 acres in size. All the shoreline on High Falls Flowage is owned by the Wisconsin Public Service Corporation. The Town of Stephenson leases a parcel of land at a location identified as Boat Landing No. 3rd along the shoreline of High Falls Flowage. The Town of Stephenson uses the leased land for a park. The Twin Bridge Ski Club puts on water ski shows at the park.

2. By application dated June 10, 1991, the Twin Bridge Ski Club applied for a permit to construct a pier thirty feet long by four feet wide and a performance platform 21 feet, one inch wide by thirty feet, three inches long on the bed of High Falls Flowage at the Town of Stephenson park. The legal description of the project site is the SW 1/4, NW 1/4 of Section 31, Township 33 North, Range 19 East, Marinette County. The Department of Natural Resources (Department) required that the application also be signed by representatives of the Wisconsin Public Service Corporation (the riparian owner), the Town of Stephenson, and the Boy Scouts of America (Twin Bridge Ski Club is affiliated with the Boy Scouts of America). An application considered complete by the Department was received on July 9, 1992. The Department and the applicants have fulfilled all procedural requirements of §§ 30.12 and 30.02, Stats.

3. The Twin Bridge Ski Club has between sixty and seventy members. The ski club performs approximately twenty water ski shows a season at the High Falls Flowage park. The shows attract audiences ranging in size from 400 to 5000 people. The Twin Bridge Ski Club was Class B state champions in 1994.

4. The performance platform the Twin Bridge Ski Club seeks to have permitted was constructed by cutting a mobile home frame in half and welding the two halves together. The purpose of the performance platform is for use in the water ski shows performed by the

Twin Bridge Ski Club and for practicing for the shows. It is placed on the bed of High Falls Flowage at the waterward end of the pier. The 21 foot width of the performance platform is parallel to the shoreline and the thirty foot length extends beyond the pier. The combined pier and performance platform structure thus extends sixty feet from the shore into the flowage.

5. During performances a backdrop is set up in the middle of the performance platform perpendicular to the shoreline. The area in front of the backdrop is visible to the audience and is approximately twelve feet wide. The portion of the performance platform in front of the backdrop is used to launch water skiers and by the performers for skits, dance routines and other acts. The area behind the backdrop is approximately nine feet wide and is used by support persons, storing of props, tow ropes and other equipment, and occasionally for launching a second group of skiers. The Twin Bridge Ski Club and the Department submitted numerous photographs of practices and performances of the ski club as exhibits at the hearing. In none of the photographs is the entire 21 foot width of the performance platform being used.

6. At times the ski club does use the entire thirty foot length of the performance platform, such as for launching a large pyramid of skiers and for some skits and dance routines. However, alternatives are available for those specific times when a larger platform is needed. Other water ski clubs have used pontoon boats or temporary platforms in their shows when a larger or additional platform is required. Skits, dance routines and other acts requiring more space can be performed on shore.

7. The subject structure has been used by the Twin Bridge Ski Club for four seasons. The members of the Twin Bridge Ski Club have adapted their performances and practices to using this platform; however, they have not shown that a performance platform the size sought is required. To the contrary, evidence in the record shows that other ski clubs use performance platforms twelve feet by 24 feet without compromising safety or suffering a decline in the quality of performance.

8. The existing performance platform is not a pier within the definitions set forth at § 30.01, Stats., or § NR 326.03(7), Wis. Adm. Code. The performance platform is not a pier because it was not built or maintained for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers from watercraft. Accordingly, a permit pursuant to § 30.12(2), Stats., is required to place the performance platform on the bed of High Falls Flowage.

9. The Wisconsin Public Service Corporation manages the shoreline of High Falls flowage according to a "wild shores" plan. The purpose of the wild shores management plan is to ensure the protection of the natural, recreational, and aesthetic values of the area. Almost all of the shoreline of High Falls Flowage is undeveloped and in a natural state. A

performance platform approximately 21 feet by thirty feet in size constitutes an unreasonable and unnecessary private intrusion into this public waterway and is detrimental to the public interest in the natural aesthetic beauty of the shoreline of High Falls Flowage.

10. The performance platform as it currently exists does not impair navigation in the High Falls Flowage.

DISCUSSION

The Twin Bridge Ski Club is attempting to develop a site to perform water ski shows and to practice for those shows. To accomplish this the ski club sought permission from the Department to grade an area on the shore of High Falls Flowage, to place a ski ramp on the bed of the High Falls Flowage and to construct a pier and performance platform on the bed of High Falls Flowage. The Department issued permits for the grading and the ski ramp. Additionally, the Department has no objection to the pier sought by the ski club. The only portion of the project the Department opposes is the performance platform. The Department objects to the size of the proposed platform.

At the time of the application, the Department investigated the application for the performance platform as if it were a pier. The Department opposed the application because its size exceeds the reasonable use guidelines for a pier. The Department is in the process of promulgating guidelines for water ski show performance platforms. The comments and other material gathered in preparation of the proposed guidelines is useful in evaluating the needs of a ski club and will be considered for that purpose in this decision.

The 1994 Edition of the National Show Ski Association Water Ski Show competition Rule (exhibit 38), rule 9.08 requires a starting dock (performance platform) a minimum of twelve feet by 24 feet in size. The proposed guidelines of the Department are consistent with this requirement. The Department will not generally oppose any performance platform which is this size or smaller. The performance platform proposed by the Twin Bridge Ski Club is approximately 21 feet by thirty feet, in other words more than twice as large in terms of area as the minimum necessary size.

The Twin Bridge Ski Club constructed its performance platform by cutting a mobile home frame in half and welding the two halves together. The size of the performance platform is a result of the material available not based on need. Once the platform was constructed the ski club adapted to its size. Undoubtedly the ski club would prefer to continue to use the entire platform; however, this is an excessive private use of a public waterway. The club argues that since the Department has already permitted a ski ramp and grading along the shoreline at the site, the natural aesthetics of the shoreline have been

compromised and; therefore, no additional harm will result from permitting the performance platform as it currently exists. This is not a persuasive argument.

The navigable waters of Wisconsin are an important natural resource. They are used by the public for a variety of activities. One of the activities is the enjoyment of viewing the beauty of a natural shoreline. Another activity is water skiing, both the skiing itself and watching a water ski performance. Both activities are legitimate and should be accommodated. Permitting the ski ramp is an accommodation to the water ski show. This accommodation is not carte blanche approval of any other structures desired by the Twin Bridge Ski Club. The ski club must still show a legitimate need for a performance platform of the size proposed. The ski club has not provided a sufficient basis for requiring a performance platform in excess of twelve feet by 24 feet in size.

Articulating the harm to the public interest of allowing the ski club to use an additional approximately 300 square feet of a 1700 acre body of water may be difficult; however, the cumulative impact of such an intrusion must be considered. The Wisconsin Supreme Court stated in a case involving placing fill into a lake "one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist." Hixon v. Public Service Commission, 32 Wis.2d 608, at 631, 146 NW.2d 577 (1966).

The proposed performance platform is found to be detrimental to the public interest in that it constitutes an unnecessary private intrusion into a public waterway and harms the natural scenic beauty of the area.

CONCLUSIONS OF LAW

1. The performance platform constructed and maintained on the bed of High Falls Flowage by the Twin Bridge Ski Club requires a permit pursuant to § 30.12(2), Stats.
2. Construction of the proposed structure is a type III action pursuant to sec. NR 150.03(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact statement.
3. The Division of Hearings and Appeals has authority pursuant to §§ 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact to issue the following Order.

ORDER

The application of Twin Bridge Ski Club, et al, for a permit to construct and maintain a pier and performance platform on the bed of High Falls Flowage is denied.

Dated at Madison, Wisconsin on September 11, 1995.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By Mark J. Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.